in the plaintiff's own evidence and between his evidence and that of his witness and to the plaintiff's avoidance of questions put to him in cross-examination and to his evasive replies.

It was further submitted that the trial judge erred in law in rejecting the evidence of the defendant on the issue of whether $6,000 or $2,000 was lent because the demeanour of the defendant in the witness box convinced him that he was not speaking the truth and in rejecting the evidence of Thaman Singh who was not impeached in cross-examination without giving reasons for so doing.

In our view there is no substance in any of the points raised. They all relate to matters entirely within the trial judge's discretion, a discretion which he exercised after having had the advantage of seeing the witnesses and hearing their evidence and with which we are unable to see any reason for interfering. So far from being satisfied that the trial judge's views were plainly wrong we have come to the conclusion that they were probably right.

For reasons best known to themselves neither counsel saw fit to address the court at the conclusion of the hearing in the court below. The trial judge's note on the matter reads as follows:—

"Jeyaretnam:" — (who represented the defendant in the lower court and before us) —

"Largely a question of fact. My learned friend says he does not wish to address the court, in that case I do not wish to address the court."

Whether a thorough and exhaustive review of the evidence by counsel for the defendant would have been of any assistance to the learned trial judge is a matter on which we do not feel disposed to speculate. The fact remains that this was not done and counsel cannot be heard to complain that matters he now considers of importance were not specifically dealt with by the learned trial judge in his judgment.

Reliance was placed by counsel for the defendant on the well-known case of *Benmax* v. *Austin Motor Co. Ltd.*,[4] as authority for the proposition that an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge. We have no quarrel with that statement as far as it goes but it only applies where the sole question is the proper inference to be drawn from specific facts and not where there is any question, as here, of the credibility of witnesses.

For that reason the principles enunciated in *Benmax's case* have no application to the present one.

It seems to us that once the learned trial judge arrived at the conclusion that the plaintiff was speaking the truth and that the defendant and his witness Thaman Singh were lying and has expressly said so in his judgment there is really nothing more left to say.

It was also argued on behalf of the defendant that the trial judge erred in law in accepting the evidence of the plaintiff because it was unbelievable that the defendant, a moneylender himself, should have signed a promissory note for $6,000 when he actually received only $2,000. All the trial judge was saying was that on the inherent probabilities of the matter he disbelieved the defendant.

Finally certain arguments were addressed to us on behalf of the defendant as tending to show that the learned trial judge had failed to appreciate the onus or burden of proof which lay upon the plaintiff but they are in our view entirely without substance.

In the result therefore the appeal fails on all points and must be dismissed with costs.

Tan Ah Tah F.J. and **Winslow J.** concurred.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell Bros.*

LIM PHOE TOE v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) January 21, 1967]

[Penang — Criminal Appeal No. 1 of 1967]

Criminal Law and Procedure — Binding over complainant — Order for binding over must be based on positive evidence that complainant is likely to commit a breach of the peace — Criminal Procedure Code (Cap. 21), s. 74(1).

In this case the appellant made a complaint against one *K* and the case was heard in the magistrate's court. *K* did not give evidence on oath but merely made a statement from the floor of the court. At the end of the case the magistrate bound over the appellant under section 74(1) of the Criminal Procedure Code.

Held: (1) the power of a magistrate to bind over a complainant should be sparingly and carefully used; and the order must be based on positive evidence that complainant is likely to commit a breach of the peace;

(2) in this case as there was no evidence to justify the course of action taken by the magistrate the order binding over the complainant must be quashed.

Cases referred to:—

(1) *Ip Ying Wah* v. *Public Prosecutor* [1958] M.L.J. 34.

(2) *Mek binte Awang* v. *Che Mas binte Awang* [1948] M.L.J. 36.

(3) *Ariffin Mohamed Ariff* v. *R.* [1955] M.L.J. 211.

MAGISTRATE'S CRIMINAL APPEAL.

Goh Eng Kee for the appellant.

Tuan Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J.: I am a little doubtful that this is a case where the appellant has a right of appeal under the Criminal Procedure Code. Previous cases are reported where appellants have appealed from an order as that made by the learned magistrate. I propose in this instance to deal with this matter by way of revision where I feel that my power to rectify an order which has been wrongly made by the lower court will not be questioned.

The appellant was a complainant in a case under section 14 of the Minor Offences Ordinance against one Khor Hoon Tee. At the end of the case, the magistrate found the charge proved against the defendant and bound her over under section 183(2)(b) of the Criminal Procedure Code. The defendant did not give evidence on oath but merely made a statement from the floor of the court. Such statement does not in my view constitute evidence upon which the learned magistrate could bind over the complainant under section 74(1) of the Criminal Procedure Code. The right of cross-examination was denied to the complainant and clearly the complainant could not in law cross-examination the defendant (*Ip Ying Wah* v. *Public Prosecutor* [1]).

The power of a magistrate to bind over a complainant under section 74 should be sparingly and carefully used (*Mek binte Awang* v. *Che Mas binte Awang* [2]). Upon authority it is also clear (*Ariffin Mohamed Ariff* v. *R.*[3]) that an order under section 74 must be based upon positive evidence that complainant is likely to commit a breach of the peace. In the present case, upon the record the incident took place in the house of the complainant and I can find nothing on record which justifies the course of action taken by the learned magistrate.

Having accepted the evidence of the complainant, which was corroborated by an independent witness, it seems to me that the binding over of the complainant purely on what the defendant probably said in instigation would tend to deter people from seeking justice in our courts.

I therefore quash the order binding over the complainant.

Appeal allowed.

Solicitors: *Goh Eng Kee & Co.*

LIM KIAT MOY v. HAMZAH

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and McIntyre J.) January 24, 1967]

[K.L. — Federal Court Civil Appeal No. X32 of 1967]

Land Laws — Caveat — Date of notice — Service — National Land Code, 1965, s. 326, Form 19C.

This was an appeal against the decision of the High Court rejecting the appellant's application to extend the life of a private caveat registered against a piece of land. The appellant had lodged the caveat against the said land on December 30, 1965. On March 25, 1966 the collector of land revenue, at the instance of the respondent, issued a notice for the removal of the caveat under the provision of section 326 of the National Land Code. This notice was served on the appellant on April 6, 1966. The collector removed the caveat on April 29, 1966. On April 8, 1966 the appellant had taken out an originating summons to apply for an order for the extension of the caveat and the summons came on for hearing on May 2, 1966. The learned judge held that the period of one month allowed by section 326 of the National Land Code had already expired and therefore he could not extend it ([1966] 2 M.L.J. 175). On appeal,

Held: the date of the notice in Form 19C of the National Land Code must be intended to mean the date when the notice was served and therefore the period of one month in this case must be reckoned from April 6, 1966; the caveat was therefore still in force when the originating summons was filed in the High Court on April 8, 1966 and also when the collector purported to remove the caveat on April 29, 1966.

Case referred to:—

(1) *Associated Dominions Assurance Society Proprietary Ltd.* v. *Balmford* (1950), 81 C.L.R. 161.

FEDERAL COURT.

K. L. Devaser for the appellant.

F. C. Arulanandom for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of Raja Azlan Shah J. rejecting appellant's application to extend the life of a private caveat registered against a piece of land to remain in force from the 30th December 1965 until such time as the appellant's claim in reference to the said land be disposed of by the High Court at Kuala Lumpur.

The facts may be summarised as follows:—

The respondent is the registered proprietor of the land in question.

By an agreement dated 13th December 1963 entered into between the respondent and the appellant, the said land was sub-leased to the appellant.

On 30th December 1965, the appellant lodged a caveat against the said land registered as "Private Caveat Presentation No. 398" under which the respondent as proprietor of the said land was forbidden absolutely the registration of any transfer, charge or lease of the said land until withdrawn by the appellant or by order of the court or until after the lapse of 21 days from the date of service of notice on the caveator (appellant) by the caveatee (respondent) at the address given in the caveat.

On the 21st March 1966, at the instance of the respondent, the collector issued notice of intended removal of the said caveat under the provisions of section 326 of the National Land Code.

On 6th April 1966, the said notice was served on the appellant.